



November 28, 2001

Mr. Jerry M. Brown
Senior Staff Attorney
The Texas A&M University System
John B. Connally Building 6th Floor
301 Tarrow
College Station, Texas 77840-7896

OR2001-5530

Dear Mr. Brown:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155358.

The Texas Cooperative Extension (the "extension") received a request for information relating to Catalogue Offer C170003, including bid submissions from all vendors, bid tabulation sheets, committee notes, and identities and notes of persons involved in the bid process. The extension claims that the requested information is excepted from disclosure under section 552.104 of the Government Code. The extension also believes that this request for information may implicate the rights of private parties. You notified those parties of this request for information and of their right to submit arguments to this office as to why the information should not be released.¹ We have considered the exception you raise and have reviewed the information you submitted. We also received comments from the requestor.²

You raise section 552.104 of the Government Code on behalf of the extension and the private parties. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 541 at 4-5 (1990). Section 552.104 protects only the interests

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

²See Gov't Code § 552.304 (providing that any interested person may submit writing comments stating why information at issue in request for attorney general decision should or should not be released).

of governmental bodies, not those of private parties that submit information to governmental bodies. See Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. See Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once bidding has ceased and a contract has been awarded. *Id.* at 5; see also Open Records Decision Nos. 306 at 3 (1982), 184 at 2 (1978), 170 at 2 (1977). In this instance, you inform this office that the extension has selected the successful vendors under the catalogue offer and bid processes. You also state that the awards under the two processes were made prior to September 1, 2001. You do not indicate that these transactions remain subject to any further bidding or negotiations. Therefore, based on your representations, we conclude that none of the requested information may be withheld from disclosure under section 552.104.

The extension notified four private parties under section 552.305. An interested private party is allowed 10 business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, none of the private parties that the extension notified had submitted any comments to this office. Thus, none of these parties has demonstrated that any of the requested information may be withheld from disclosure. See Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990) (if governmental body takes no position, attorney general will grant exception to disclosure if third party makes *prima facie* case that information qualifies as trade secret under statutory predecessor to Gov't Code § 552.110(a), and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm).

We note, however, that the submitted information contains the e-mail addresses of private individuals. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Sess. Law Serv. 614 (Vernon) (to be codified as Gov't Code § 552.137).³

Section 552.137 excepts from disclosure an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. Thus, the extension must withhold any e-mail address that an individual submitted for the purpose of communicating electronically with the extension, unless the individual affirmatively consented to the release of the e-mail address. We have marked this information.

In summary, none of the requested information is excepted from disclosure under sections 552.104 or 552.110 of the Government Code. An e-mail address that was provided to the extension by a member of the public must be withheld under section 552.137, unless the individual affirmatively consented to the release of that information. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

³House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. See Act of May 22, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Sess. Law Serv. 974, 975 (Vernon) (to be codified as Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

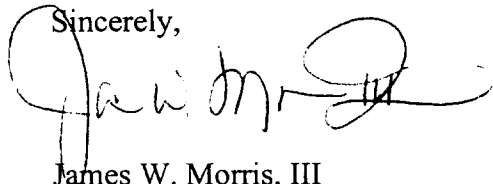
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 155358

Enc: Marked documents

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